NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 08-722

	Opinion Delivered FEBRUARY 18, 2009
JEREMY LONG APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, [NO. CR-2008-14-G]
V.	HONORABLE J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Jeremy Steven Long entered a negotiated plea of guilty to residential burglary, and was sentenced to two years in prison followed by an eight-year suspended imposition of sentence. A separate restitution hearing was held, and Mr. Long failed to appear at that hearing. At the conclusion of the hearing, the trial court announced that it was awarding $47,975 in restitution, to be reduced by insurance proceeds that the victim might later receive. An order was subsequently entered requiring Mr. Long to pay $45,286 in restitution at a rate of $100 per month.

Mr. Long now appeals from the restitution order.[1] He argues on appeal that the trial court erred by sentencing him in absentia. He further argues that the State failed to prove the amount of restitution by a preponderance of the evidence.

At the outset of the hearing, the trial court announced:

> Let's take up the restitution hearing on Jeremy Steven Long that was here for a determination of restitution. I want the record to show that this hearing was initially set yesterday, that Mr. Long called the court and said that allegedly that his car slid off the road and he wasn't able to get here. It is my understanding that he was to turn himself in today to start serving a sentence at the Arkansas Department of Corrections; he was to turn himself in at 10:00 o'clock. I have been advised by the sheriff's office that he has not. It is now noon. The court is going to proceed with this restitution hearing and the court is finding that Mr. Long has voluntarily absented himself from this court proceeding.

Mr. Long's counsel objected to proceeding in the appellant's absence, arguing that restitution was an integral part of Mr. Long's criminal plea and sentence. Appellant's counsel acknowledged that Mr. Long was supposed to surrender that morning, that he did not know the circumstances of appellant's failure to appear, and that his understanding was that appellant's father was going to bring him in. The trial court proceeded with the restitution hearing over appellant's counsel's objection.

The only witness to testify at the restitution hearing was the victim, Penny Vandellen. Mrs. Vandellen testified that she lost numerous jewelry items in the burglary, and has recovered none of them. Mrs. Vandellen stated that she went to a gemologist at Newton's Jewelry and described the missing jewelry in great detail, while also providing three

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[1]We acknowledge that ordinarily an appeal cannot be taken from a guilty plea. However, because this appeal does not constitute a review of the guilty plea itself, the appellant is not precluded from bringing an appeal challenging the restitution. *See Nix v. State*, 54 Ark. App. 302, 925 S.W.2d 802 (1996).

photographs to the gemologist. These photographs depicted Mrs. Vandellen wearing two of the stolen rings, and one of the photos was a closeup picture of her hand while wearing her wedding band. The other photos showed Mrs. Vandellen from a distance. The gemologist would not give a certified appraisal because he did not have the actual jewelry present, but he was able to come up with approximate values.

Mrs. Vandellen prepared a list entitled "jewelry lost in burglary," which described the items and contained the gemologist's valuations. This list was admitted into evidence as the State's first exhibit over appellant's objection, and provides:

3 ct Diamond Tear Drop in 24 ct gold setting	15,500.00
2 ct Diamond men's wedding band in 24 ct gold	12,250.00
1/4 ct Emerald with 2 diamonds on each side From Saudi Arabia	1200.00
Emerald and diamond ring One row of emeralds, two rows of diamonds From Saudi Arabia	1200.00
Sterling Silver ladies wedding set ½ ct diamond WHITE GOLD	3500.00
10 ct gold ring with 8 little diamonds x 2(16)	1000.00
Black Hills Gold ring	775.00
Ladies 10 ct wedding set with 2 ct diamond solitaire, 2 rows of 4 little diamonds	10,750.00
2003 Kirtland, NM class ring with March stone	350.00

In addition to the above items, Mrs. Vandellen stated that another ring was stolen for which she had a written appraisal from 1986. That appraisal was introduced into evidence and contained a description and photograph of the ring, and an estimated replacement value of $875. Mrs. Vandellen showed this appraisal to the gemologist at Newton's, and he estimated its current value at $1450. Mrs. Vandellen testified that calculating the aggregate amount of

the valuations made by the gemologist, the total value of all of the jewelry taken from her was $47,975.

On cross-examination Mrs. Vandellen acknowledged that she was not able to tell the gemologist anything about the grade or optical clarity of any of the stones. She also testified that she had the jewelry insured for up to $2500, but had not yet received the insurance proceeds. Upon questioning by the trial court, Mrs. Vandellen testified:

> It is my opinion as the owner of the property that the figures there on the right side of State's Exhibit Number 1 are the minimum that my property would be worth. They put the low bottom dollar on them because they couldn't see the actual piece of jewelry.

Mr. Long's first argument in this appeal is that the trial court erred by proceeding with the restitution hearing without his presence in the courtroom. Sentencing is a critical stage of a criminal case, and a defendant has a constitutional right to be present at any stage of the criminal proceeding that is critical to its outcome. *Lowery v. State*, 297 Ark. 47, 759 S.W.2d 545 (1988). The defendant's presence at sentencing for a felony is required. *Id*. Every reasonable presumption must be indulged against the waiver of fundamental constitutional rights. *Parrish v. State*, 65 Ark. App. 66, 984 S.W.2d 460 (1999).

In the present case, Mr. Long contends that the trial court erred in finding that he voluntarily absented himself from the hearing, and thus waived his right to be present, without conducting further inquiry into his reason for being absent. Mr. Long further submits that because he failed to show up altogether, as opposed to appearing for the hearing and then absconding, he was never given the opportunity to be heard in person.

Mr. Long relies on our supreme court's decision in *Lowery v. State*, *supra*. In that case, the appellant was brought before the court for a hearing to revoke a five-year suspended sentence, and the court informed appellant that he had an additional thirty days to make restitution and sixty days to pay the fine and costs, but that if he failed to do so his suspended sentence would be revoked without further proceedings. Subsequently, the court entered an order revoking his suspended sentence and sentenced appellant to a prison term of three years, ten months, and fifteen days. Neither appellant nor his attorney was present. The supreme court reversed and remanded, holding that appellant had a fundamental right to be present at the sentencing hearing and did not waive his right.

We hold that under the facts of the present case the trial court did not err in proceeding with the restitution hearing because Mr. Long was given notice and an opportunity to be heard, but waived his right to be present by failing to appear. Unlike the situation in *Lowery v. State*, *supra*, Mr. Long's counsel appeared at the restitution hearing, and it was evident that Mr. Long had notice of the hearing as he contacted the trial court on the previous day and said he could not appear at the previously-scheduled hearing because his car slid off the road. Appellant's counsel understood that Mr. Long's father was to deliver Mr. Long to begin serving his sentence two hours before the hearing was to begin, and yet Mr. Long absented himself and failed to communicate any excuse to the trial court or his counsel.

In *Parrish v. State*, *supra*, we affirmed a revocation where the appellant appeared for the hearing and then left the courtroom before the hearing began. We held that the trial court did not err in conducting the revocation hearing in the appellant's absence because, by

his flight on the morning of the hearing, he waived his right to be present. Mr. Long attempts to draw a distinction between *Parrish v. State, supra*, and the instant case because Mr. Long did not appear for the hearing and then later abscond. However, our supreme court in *Reece v. State*, 325 Ark. 465, 928 S.W.2d 334 (1996), held that a defendant had waived his presence at trial when he admitted that he overslept. Similarly, Mr. Long's complete failure to appear in the case at bar constituted a waiver of his right to be present.

Moreover, in *Ridling v. State*, 348 Ark. 213, 227, 72 S.W.3d 466, 474 (2002), our supreme court wrote:

> When a significant step in the case is taken in an accused's absence, the case must be reversed, if it appears that he has lost an advantage or has been prejudiced by reason of a step taken in his absence. The reason for the rule is to secure to the accused a full and adequate defense at his trial. Where there is no possibility of prejudice, however, there is no reason for requiring the presence of the defendant.

(citations omitted.) In the instant case, Mr. Long's counsel cross-examined the State's only witness, offered no witnesses in rebuttal, and did not indicate that Mr. Long's testimony was necessary to challenge the victim's description and valuation of the jewelry. Therefore, there is no indication that Mr. Long was prejudiced by his absence from the hearing.

Mr. Long's remaining argument is that the trial court erred in awarding $47,975 in restitution. Pursuant to Ark. Code Ann. § 5-4-205(a)(1) (Repl. 2006), a person who enters a plea of guilty may be ordered to pay restitution. The purpose of restitution is to make the victim whole with respect to the financial injury suffered. Ark. Code Ann. § 16-90-301 (Repl. 2006). The sentencing authority is required to make a determination of actual economic loss caused to a victim by the offense. Ark. Code Ann. § 5-4-205(b)(4)(A) (Repl. 2006). On appeal, it is our job to determine whether the amount of restitution is supported

by substantial evidence. *See Jester v. State*, 367 Ark. 249, 239 S.W.3d 484 (2006). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion without resorting to speculation or conjecture. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002).

Mr. Long contends that the amount of restitution awarded in this case was based on speculation, and that the State failed to meet its burden of proof as to the actual economic loss caused to the victim. Mr. Long asserts that the only witness was the victim, who provided self-serving testimony and obtained hearsay value approximations from a gemologist who neither saw the actual items of jewelry nor was present in court to be cross-examined. Mr. Long notes that there was only one closeup view of a single item of jewelry presented to the gemologist, and contends that even that photograph was insufficient to provide a valuation with any reasonable degree of professional certainty. Appellant argues that other than the one item of jewelry appraised for $875 in 1986, it is impossible to conclude that a fair market value could be attached to any pieces of the jewelry with any reasonable degree of certainty. Finally, Mr. Long submits that because the victim admitted that she filed a $2500 insurance claim, this amount should have been deducted from the total amount of restitution and the trial court further erred in declining to do so. Mr. Long asserts that the only appropriate remedy is a remand for a new restitution hearing.

We hold that there was substantial evidence to support the amount of restitution ordered by the trial court. It is for the fact-finder, and not the appellate court, to weigh the evidence and assess witness credibility. *See Beavers v. State*, 345 Ark. 291, 46 S.W.3d 532 (2001). In this case Mrs. Vandellen was intimately familiar with the jewelry that had been

in her family for many years, and she gave a detailed description of each item to the gemologist. Mrs. Vandellen testified that the missing jewels were assigned a minimal value due to the inability to determine the actual quality of the jewelry, and this testimony was accepted by the trial court. The restitution awarded was not the result of speculation. And as the State asserts in its brief, Mr. Long can hardly benefit from the unavailability of the jewels to challenge a good-faith valuation of the missing items by a gemologist, which was based on detailed descriptions of the jewelry.[2]

Finally, we note that Mr. Long mistakenly asserts that he was ordered to pay $47,975 in restitution, because while the trial court announced that amount from the bench, the order of restitution reflects $45,286. Contrary to appellant's argument, the trial court actually

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[2]Our affirmance finds support in *Armory v. Delamirie*, King's Bench, 1 Strange 505 (1722):

> The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:
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> 3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice (Pratt) directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

reduced the restitution by slightly more than the $2500 in insurance proceeds identified by the victim.

Affirmed.

MARSHALL and BROWN, JJ., agree.